

THE DISCRETION TO EXCLUDE ILLEGALLY AND IMPROPERLY OBTAINED EVIDENCE: A CHOICE OF APPROACHES

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[The judicial discretion to exclude legally admissible evidence on the basis that it was illegally or improperly obtained has, as yet, been little exercised in the common law world outside the United States. The incidence of its use in a given jurisdiction has depended largely on the weighting given by the judiciary concerned to the competing public policy considerations of: (a) controlling crime (by obtaining more convictions) and (b) protecting the community from improper harassment by law enforcement officers. The author argues that English courts have tended to over-emphasize the crime control aspect of the judicial process by their reluctance to exclude any admissible evidence, however it was obtained. He adds that Australian courts have tended to lean in the same direction in their attitude. With spiralling crime rates on the one hand, and widespread fear of increased police invasion of individual privacy on the other, this discretion would seem destined to assume a critical importance in years to come.]

The judicial discretion to exclude illegally and improperly obtained evidence is a modern development in the law of evidence. It was only in the Privy Council decision in *Kuruma v. R.*¹ that a firm view was expressed; it being that evidence legally admissible and relevant, if illegally obtained, may be excluded at the discretion of the trial judge. Lord Goddard C.J., in giving the advice of the Board had 'no doubt' that 'in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused'.² Until the recent decision of the English Court of Appeal in *R. v. Sang*,³ all the post-*Kuruma* English cases dealing with illegally or improperly obtained evidence had accepted this view with equanimity.⁴ However, the fact that such a discretion, if it exists, has been rarely exercised⁵ has disturbed the English Court of Appeal⁶ and the House of Lords⁷ sufficiently to cause them to express doubts as to whether the discretion does exist or has ever existed at all.

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¹ [1955] A.C. 197.

² *Ibid.* 204.

³ [1979] 2 All E.R. 46.

⁴ For example, *Callis v. Gunn* [1964] 1 Q.B. 495; *R. v. Payne* [1963] 1 All E.R. 848; *R. v. Maqsood Ali* [1965] 2 All E.R. 464; *King v. R.* [1968] 2 All E.R. 610; *R. v. Burnett and Lee* [1973] *Criminal Law Review* 748; *Jeffrey v. Black* [1978] 1 All E.R. 555.

⁵ Only in two instances have English courts exercised the discretion and excluded improperly obtained evidence: *R. v. Court* [1962] *Criminal Law Review* 697; *R. v. Payne* [1963] 1 All E.R. 848.

⁶ *R. v. Sang* [1979] 2 All E.R. 46.

⁷ *R. v. Sang* [1979] 2 All E.R. 1222.

It is submitted that this current state of the law in England is due largely to the paucity of analysis of the purpose and rationale of the discretion.⁸ This conspicuous lack of judicial examination may perhaps be partially due to the fact that only a small number of cases involving illegally and improperly obtained evidence have come before the English courts. However, other Commonwealth courts, notably those of Scotland, Northern Ireland and Australia, despite having also had few opportunities to rule on the exercise of the discretion, have nevertheless been able to provide an explanation of and justification for the discretion. The probable reason for this difference lies in the adoption by the English courts of the notion of fairness to determine the exercise of the discretion.

The uncertainty as to the meaning and scope of 'fairness' has resulted in the development of a strict rule of admissibility and, conversely, the virtual non-exclusion of illegally and improperly obtained evidence. Worse still, preoccupation with the notion of fairness has prevented the English courts from evaluating the public policy considerations which inevitably underlie the exercise of the discretion. That such considerations exist is readily gleaned from the very nature of the evidence dealt with: it assists the prosecution case and as a result assists in the conviction of the guilty; on the other hand it has been obtained through the illegal or improper conduct of law enforcement officers. In the exercise of the discretion, the trial judge must necessarily decide whether the public interest of crime control or that of protecting individual rights against official impropriety should hold sway.

It is the increasingly expressed awareness of the Scottish, Irish and Australian courts of this need to weigh the conflicting public policy considerations which has allowed for a much fuller analysis of the discretion. The English common law discloses none of the heart-searching on the subject which has been a prominent feature of the Scottish, Irish and, more recently, Australian judicial scene.

This article compares and contrasts the English and Canadian approach with that of the Scottish, Irish and Australian courts in the exercise of the discretion to exclude illegally and improperly obtained evidence.

THE EXISTENCE OF A DISCRETION TO EXCLUDE ILLEGALLY AND IMPROPERLY OBTAINED EVIDENCE

There is a strong line of English authority stating that the trial judge may exclude evidence which he holds to be relevant, strictly admissible and of unimpeachable probative value on the ground that its reception would 'operate unfairly against the accused'.⁹ However, the English Court

⁸ This statement also applies to the Canadian formulation of the discretion to exclude illegally and improperly obtained evidence.

⁹ See cases at *supra*, n. 4. Evidence illegally or improperly obtained would often

of Appeal and two of the Law Lords in the recent case of *R. v. Sang*, refused to regard the discretion as extending this far. It was held that the general rule was that evidence which is relevant is admissible however that evidence is obtained. The only qualification was that the courts had power to exclude such evidence if it was of little probative value but of great prejudicial effect.¹⁰ The qualification did not justify a trial judge refusing to admit evidence of probative value because it had been obtained through some illegal, unfair or improper means. It was not for the trial court to inquire into how the evidence was obtained unless the value of the evidence was affected by the means by which it was procured.¹¹

A similar pattern in judicial opinion on the discretionary power to exclude relevant evidence of unimpeachable probative value may be traced in Canadian courts. It has long been recognized in Canada that evidence of relatively little weight can be excluded in circumstances where its admission would be unfairly or disproportionately prejudicial.¹² But in *R. v. Wray*, the Ontario Court of Appeal, affirming the decision of the trial judge, declared that the principle applied even to matters of obvious probative value.¹³ However, the Supreme Court of Canada,¹⁴ by a majority of six to three, expressly rejected this view of the law. The majority held that such a view was not based on any authority and, in reaching this conclusion, were of the view that the *Kuruma* discretion was founded upon the English case of *Noor Mohamed*. That discretion was felt to have been unduly extended in some of the subsequent cases. The Canadian Supreme Court then defined the exercise of the discretion in the following way:

[T]he exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.¹⁵

The view taken by the English Court of Appeal, and the two Law Lords in *Sang*, and by the majority of the Canadian Supreme Court in *Wray* has the merits of clarity and consistency. It has always been difficult to understand Lord Goddard's *dictum* in *Kuruma* — '[i]f, for instance, some

be of unimpeachable probative value and the trial judge ruling that such evidence is inadmissible on the ground of unfairness to the accused is certainly a possibility.

¹⁰ *R. v. Sang, supra*, n. 3, 62; *R. v. Sang, supra*, n. 7, 1222; *per* Lord Diplock, 1228-30; *per* Viscount Dilhorne, 1234.

¹¹ This conclusion was arrived at upon the Court of Appeal and the two Law Lords treating the *dictum* of Lord Goddard in *Kuruma* as founded upon and going no further than what was said in the 'similar fact' case of *Noor Mohamed v. R.* [1949] 1 All E.R. 365.

¹² The Canadian courts in this respect have cited the English authorities with approval.

¹³ (1970) 9 C.R.N.S. 131.

¹⁴ (1970) 11 D.L.R. (3d) 673.

¹⁵ *Ibid. per* Martland J., 689-90.

admission of some piece of evidence, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out¹⁶ — in the light of the actual decision of that case. To seize evidence in the course of an illegal search would seem to be worse than to obtain it by a trick. Yet the decision was that the evidence, obtained by an illegal search, was rightly admitted. According to the decisions in *Sang* and *Wray*, therefore, the discretion to exclude evidence admissible in law only exists where there is a degree of doubt as to the reliability of the evidence or where the prejudicial effect of the evidence might outweigh its probative value.

It would, however, be premature to conclude that in England and Canada, there is now effectively no judicial discretion to exclude illegally and improperly obtained evidence. There are still strong and influential authorities which continue to support the contention that such a discretion does or ought to exist.

The House of Lords in *Sang* was divided on the issue of whether there was a judicial discretion to refuse to admit evidence which is relevant and of unimpeachable probative value.¹⁷ As stated earlier, two Law Lords preferred the view of the Court of Appeal. Of the remaining three, one was reluctant to comment on the scope of the discretion on the ground that any such observation would be merely *obiter dicta* in the case before him.¹⁸ The other two Law Lords considered the existing cases recognizing a wide discretion to be 'so numerous and so authoritative' that they could not be disregarded or treated as applicable only where the prejudicial effect of the evidence outweighed its probative value.¹⁹

Although the Canadian Supreme Court decision in *Wray* establishes a rule which comes close to an universal admissibility of evidence illegally or improperly obtained, that decision has not gone unopposed. The Law Reform Commission of Canada, in its report on evidence,²⁰ proposed legislation to the effect that 'evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to

¹⁶ *Supra* n. 1, 204.

¹⁷ This point, coupled with the fact that their Lordships were answering a question much wider than any raised by the assumed facts of the case make this decision inconclusive authority for the proposition that the discretion to exclude illegally or improperly obtained evidence is narrow or that it does not exist at all. See Heydon J. D., 'Entrapment and Unfairly Obtained Evidence in the House of Lords' [1980] *Criminal Law Review* 129, 132-5.

¹⁸ *Supra* n. 7, per Lord Salmon, 1237.

¹⁹ *Ibid.* per Lord Fraser, 1241; Lord Scarman, 1247 said that 'the question remains whether evidence obtained from an accused by deception, or a trick, may be excluded at the discretion of the trial judge. Lord Goddard C.J. thought it could be: *Kuruma son of Kanui v. R.* Lord Parker C.J. and Lord Widgery C.J. thought so too: see *Callis v. Gunn* and *Jeffrey v. Black*. The *dicta* of three successive Lord Chief Justices are not to be lightly rejected. . . . [A]lways, provided that these *dicta* are treated as relating exclusively to the obtaining of evidence from the accused, I would not necessarily dissent from them.'

²⁰ *Law Reform Commission of Canada. Report on 'Evidence' (1975).*

bring the administration of justice into disrepute'.²¹ In determining whether the evidence should be excluded, the court should consider 'all the circumstances surrounding the proceedings and the manner in which the evidence was obtained'.²² The Commission intended by this proposal 'to give judges the right in exceptional cases to exclude evidence unfairly obtained, and thus restore what many believe to be the English common law discretionary rule'.²³ The discretionary rule referred to here is the wide discretion thought to exist in England until the Court of Appeal decision in *Sang*. The comment of the Law Commission was echoed by Lord Widgery C.J. in the English case of *Jeffrey v. Black* when he stated that the discretion is to be exercised whenever it would be 'unfair or oppressive' to allow particular evidence to be called by the prosecution, but he cautioned that exercise of the discretion should be limited to 'a very exceptional situation'.²⁴ It is submitted that it appears from the above discussion that a wide formulation of the *Kuruma* discretion might, or at least ought to, exist as a recent and rational development of judge-made law.

The existence of the discretion to exclude illegally and improperly obtained evidence in Scotland and Australia need only be briefly mentioned here. The principal authority for the recognition of a wide discretionary rule in Scotland is the High Court of Justiciary case of *Lawrie v. Muir*.²⁵ In delivering the judgment of the court, Lord Justice-General Cooper evolved a rule that an irregularity in the obtaining of evidence does not necessarily render such evidence inadmissible, but that the court ought to consider whether the irregularity could be excused, taking into account the circumstances in which it was committed and the seriousness of the charge under consideration. Applying the rule to the facts before it, the court held that the evidence had been wrongly admitted. Scottish courts have since rendered inadmissible illegally or improperly obtained evidence in a number of cases.²⁶

Recently, the High Court of Australia in *Bunning v. Cross*²⁷ used *dicta* in its earlier decision of *R. v. Ireland*²⁸ to come alongside the Scottish formulation and exercise of the discretion. This judicial move has already led one Australian Supreme Court to exclude evidence which had been illegally procured²⁹ and it can be expected that more such instances of the use of the discretion will follow. In contrast, in the twenty five years since its pronouncement in *Kuruma*, the English discretion has been

²¹ Draft Evidence Code, s. 15(1). Report, *ibid.* 22.

²² *Ibid.* s. 15(2). Emphasis added.

²³ Report, *ibid.* 62.

²⁴ [1978] 1 All E.R. 555, 559.

²⁵ [1950] S.L.T. 37.

²⁶ For example, see *M'Govern v. H.M. Advocate* [1950] S.L.T. 133; *H.M. Advocate v. Turnbull* [1951] S.L.T. 409.

²⁷ (1978) 52 A.L.J.R. 561.

²⁸ [1970] A.L.R. 727.

²⁹ *French v. Scarman* [1979] 20 S.A.S.R. 333.

exercised to exclude improperly³⁰ obtained evidence in only two cases.³¹ This difference in the practical operation of the discretion between the English and Canadian courts on the one hand and the Scottish and Australian courts on the other is the result of the differing objects sought to be attained by the exercise of the discretion.

PUBLIC POLICY CONSIDERATIONS INFLUENCING THE EXERCISE OF THE DISCRETION

An analysis of the nature of the evidence which is subject to the discretionary rule spelt out in *Kuruma* or in *Bunning* will reveal two conflicting public policy considerations in play. On the one hand, the evidence is relevant and of obvious probative value to the prosecution case; such evidence should be admitted if the criminal is to be punished. This may be called the crime control consideration. On the other hand, one has to consider the fact that the evidence has been procured by law enforcement officers through some illegal or improper means. The public need to control police misbehaviour and to protect individual liberties would require the evidence to be excluded. This may be termed the public safety consideration. This public policy issue has more than mere theoretical importance because in a system which entrusts courts with a discretion whether to exclude such evidence, the way in which that discretion is exercised inevitably depends upon certain preferences as to the objects that might be achieved. The courts in various jurisdictions, with the notable exception of England, have given express recognition to the two competing public policy considerations which influence the discretion. A few examples of such *dicta* may be given.

In the Irish case of *The People (Attorney-General) v. O'Brien*, Kingsmill Moore J. noted:

a choice has to be made between desirable ends which may be incompatible. It is desirable in the public interest that crime should be detected and punished. It is desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its ends by utilizing the fruits of such methods.³²

In *Olmstead v. United States*, Holmes J. expressed the existence of conflicting public policy considerations in the following terms:

Therefore we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained.³³

Similarly, in the Scottish decision of *Lawrie v. Muir*, Lord Cooper said:

³⁰ There has yet to be an English decision rejecting evidence on the ground that it had been illegally obtained.

³¹ *Supra* n. 5.

³² [1965] I.R. 142, 160.

³³ (1927) 277 U.S. 438, 470.

The law must strive to reconcile two highly important interests which are liable to come into conflict — (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost.³⁴

Finally, in the Australian High Court decision in *R. v. Ireland*, the learned Chief Justice, Sir Garfield Barwick, while discussing the discretion of the trial judge to reject unlawfully or unfairly procured evidence, said:

in the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.³⁵

Although all these *dicta* spell out the two conflicting public policy claims, one cannot read them without noticing a difference in judicial response to resolving these claims. The learned judges, Kingsmill Moore J. and Holmes J., speak of the necessity to choose between one or other of the competing interests. The choice has been made in the United States where individual liberties are given the judicial protection of a strict rule excluding illegally and improperly obtained evidence.³⁶ Conversely, as will be discussed, the English courts have in practice regarded the public interest of crime detection as superior; a strict rule of admissibility operates there to allow the admission of unlawfully or unfairly procured evidence. But the statements of Lord Cooper and Chief Justice Barwick suggest that, rather than a choice being made between the competing public policy considerations, they are to be 'reconciled' or 'weighed against each other'. It is suggested that this is the better approach. Rather than the strict exclusion or admission of illegally or improperly obtained evidence, the trial judge should consider and balance all the public policy interests with regard to the facts and circumstances of each case.

The nature, content and claims of the two opposing public policy considerations warrant brief discussion.

³⁴ *Supra* n. 25, 39-40.

³⁵ *Supra* n. 28, 735. The High Court in *Bunning*, *supra* n. 27, 569, said: 'What *Ireland* involves is . . . the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.' *The N.S.W. Law Reform Commission Working Paper on 'Illegally and Improperly Obtained Evidence'* (1979), Draft Bill, s. 200(6)(a) also lays down the public interests which a court is to be guided in the exercise of the discretion formulated in the Bill. These public interests are (i) upholding of the law, (ii) protection of people from illegal or unfair treatment, (iii) punishment of those guilty of crime, and (iv) seeing that court proceedings are not determined in the absence of relevant evidence. The first two interests may be regarded as public safety considerations and the latter two as crime control considerations.

³⁶ Hartman P., 'Admissibility of Evidence Obtained by Illegal Search and Seizure under the U.S. Constitution' (1965) 28 *Modern Law Review* 298; Heydon J. D., 'Illegally Obtained Evidence' [1973] *Criminal Law Review* 603, 610-12.

The Crime Control Consideration

The crime control consideration embodies the general justifying aim³⁷ of the administration of criminal justice — that the guilty should be detected, convicted and duly sentenced. It reflects the underlying purpose of the whole apparatus of criminal justice — the prevention or control of crime.

Underlying the consideration is the proposition that the repression of criminal conduct is the most important function to be performed by the criminal process. Failure of law enforcement to bring crime under tight control is seen to lead to the breakdown of public order. If it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process, a general disregard for legal controls tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasions of his interests. His security of person and property is sharply diminished and, as a result, so is his liberty to function as a member of society. Ultimately, the claim of the crime control consideration is that the criminal process is a positive guarantor of social freedom.

When placed in the context of the decision in *Kuruma*, the consideration is highlighted by Lord Goddard's *dicta* that if evidence is relevant it is admissible and the court is not concerned with how the evidence was obtained.³⁸ The underlying doctrine expressed in this statement is that the court should not be deprived of reliable evidence; that whether or not it is illegally or improperly obtained, real evidence, unlike men, cannot lie. The crime control consideration posits the determination of the truth of the criminal charges as the sole purpose of the criminal trial and, therefore, evidence should be admitted or excluded solely on the grounds of reliability. In a rudimentary way, the rule that probative evidence is admissible regardless of the manner in which it has been obtained is a judge-made rule. A judge trying a criminal case naturally wants to get at the truth and, therefore, favours the utilization of any evidence which may help find the truth. He dislikes having to deal with incidental issues such as the legality of the method by which evidence has been obtained, which may affect the disposition of the case.

Since the consideration places a high premium on the apprehension and conviction of criminals, it follows that primary attention is paid to the efficiency with which the criminal process operates to screen suspects, determine guilt and secure appropriate sentence to persons convicted of crime. The criminal process cannot function efficiently if it is cluttered with collateral enquiries which delay and confuse the accused's trial. Determining whether improperly obtained evidence should be excluded is one such enquiry. It therefore has no place in a criminal process built upon the crime control consideration.

³⁷ This term has been adopted from Hart H. L. A., 'Prolegomenon to the Principles of Punishment' in *Punishment and Responsibility* (Oxford, 1968) Ch. 1.

³⁸ *Supra* n. 1, 204.

No English court has ever fully examined the public policy considerations affecting the exercise of the discretionary rule to exclude illegally or improperly obtained evidence. In that jurisdiction, the decisions have almost invariably been to admit the evidence and the assumption seems to have been that the evidence was fact and therefore reliable. Hence, English judges may be regarded as holding, sub-consciously at least, the crime control consideration paramount when they contemplate the use of the discretion. Conversely, it would appear that the public safety consideration has received little attention.³⁹

The Public Safety Consideration

This consideration incorporates two principles, namely, the 'individual rights principle' which concerns the primacy of the individual and the complementary 'disciplinary principle' which involves the limitation of official power. When these principles are given their due recognition in the criminal justice system, a bulwark is created against the development of a totalitarian State; hence the description of the consideration as being one of 'public safety'. Advocates of the public safety consideration do not deny that determining the truth of the criminal charges should be the main function of criminal trials. However they argue that, in some instances, the pursuit of this general justifying aim should be qualified by considerations arising from the two principles just mentioned. The individual rights principle invokes the notion that members of a community ought not to be subjected to certain kinds of treatment and ought, when suspected or accused of crime, to have certain facilities. Thus this principle focuses on respect for certain rights of the individual, a respect which places limitations on the methods which may properly be used in crime control. The disciplinary principle is geared to controlling abuse; the system contains certain restrictions to ensure that law enforcement officers and others who wield power do not overstep the proper limits of their authority. Once the balance between individual liberty and State power in the control of crime has been settled, it is important to ensure that, as far as possible, that balance is preserved in practice.

The public safety consideration is especially attractive to those who are sceptical about the morality and the utility of the criminal sanction. The criminal law's notion of just condemnation and punishment is seen by them as 'a cruel hypocrisy visited by a smug society on the psychologically and

³⁹ This response is openly expressed in other areas of the English criminal law. For example, in recommending that the caution be abolished and that the silence of the suspect at interrogations may be inference as to guilt, the English Criminal Law Revision Committee gave as one of its main reasons the need to combat the 'large and increasing class of sophisticated professional criminals who are . . . highly skilful in organizing their crimes . . .'. Eleventh Report on 'Evidence (General)' Cmnd. 4991 (1972) para. 21(vi), p. 12.

economically crippled'.⁴⁰ This scepticism, which may be fairly said to be widespread among the most influential of contemporary leaders, leads to an attitude toward the processes of the criminal law which engenders 'a peculiar receptivity toward claims of injustice which arise within the traditional structure of the system itself; fundamental disagreement and unease about the very bases of the criminal law has, inevitably, created acute pressure at least to expand and liberalize those of its processes and doctrines which serve to make more tentative its judgments or limit its power.'⁴¹

This, it is submitted, is a healthy scepticism which members of the Legislature, and the Judiciary ought to heed, or at least consider. The present English system, with its emphasis on the crime control consideration, might be acceptable if the principles embodied in the public safety consideration had been properly considered and rejected for express reasons. But they have not been, and it is vital that these principles be accorded urgent and due notice in that jurisdiction.

APPROACHES IN THE EXERCISE OF THE DISCRETION

Given that there exists a judicial power to exclude illegally and improperly obtained evidence and that the exercise of this power is influenced by contrasting public policy considerations, how does a court approach the whole subject in a case immediately before it? In the current legal systems under study, there appear to be three approaches that a court can take. The first is to adopt a rigid general rule of exclusion or admissibility; all wrongly obtained evidence is either excluded or admitted out of hand. The second approach is to endow the courts with an exclusionary discretion which operates on the notion of fairness; the evidence is excluded if the court considers that to admit it would be unfair to the accused. Thirdly there is what may be called the factors approach; the exercise of an exclusionary discretion is dependant on the consideration of certain factors present in the case.

The Strict Rule Approach

A strict rule operates in the United States to render evidence inadmissible if it has been illegally or improperly obtained, regardless of the facts and circumstances of each case.⁴² Conversely, Canadian law incorporates a

⁴⁰ Bator P., 'Finality in Criminal Law and Federal Habeas Corpus for State Prisoners' (1963) 76 *Harvard Law Review* 441, 442.

⁴¹ *Ibid.* 441, 442-3.

⁴² A strict exclusionary rule has also been recommended by the *Criminal Law and Penal Methods Reform Committee of South Australia*, Report on Criminal Investigation (1974). The Committee proposed that illegally obtained evidence should be excluded automatically except where it was obtained by urgent entry or where the illegality is not directed against and does not relate to the person against whom the evidence is tendered. *Ibid.* Ch. 7, para. 3.3. There was to be no other exception and particularly not for accidental breaches. *Ibid.* Ch. 7, para. 3.2.2.

strict rule of admissibility which allows admission of the evidence irrespective of the particular features of the case.⁴³ The American and Canadian rules have the advantage of certainty which the other approaches lack. But certainty can be bought at too dear a price. This is borne out when the strict rules are considered alongside the public policy considerations of crime control and public safety.

The strict exclusionary rule is in direct confrontation with the crime control consideration. Such a rule fails to accord consideration to the general justifying aim of the criminal justice system, which is to prevent crime. There may be serious crimes that cannot be eradicated without occasional resort to deception and other irregular detection methods. The strict exclusionary rule has the effect of placing too much emphasis on the two principles underlying the public safety consideration. With regard to the disciplinary principle, there is little point in deterring or punishing conduct which is accidental or which is, as a matter of common sense, justified by seriousness, urgency or necessity. A strict exclusionary rule purports to do just this when it excludes evidence which might have been procured through unconscious or trivial illegalities.

Then there may be some crimes of so serious a nature that not to convict their perpetrators would undermine the whole social order. A strict exclusionary rule which gives prominence to the individual rights principle might have this effect.

On the other hand, a strict rule of admissibility which exists in Canada fails to give any weight to the public policy consideration. The Canadian rule contends that it is not the function of the courts to maintain supervision over law enforcement officers; the objective of the courts is to determine simply whether the accused is guilty of the criminal charges against him. Hence the rule disclaims any importance that might be accorded to the disciplinary principle. As to the individual rights principle, a strict rule of admissibility clearly pays scant regard to it. The evidence is admitted despite the fact that it has been procured by the infringement of certain rights which the law has accorded to the accused. The danger of such a rule is that it can easily become a tool for those seeking to create a police State.

It may be concluded that the advantages of certainty afforded by the strict rules are outweighed by the need to take into account, case by case, the public policy considerations. So long as a rule supports only one of the two competing considerations, it suffers the defect of omitting the other.

⁴³ Although the Canadian courts purport to adopt the notion of fairness, this rule was formulated by the majority decision in the Supreme Court decision of *Wray*, *supra* n. 14. See *ante* 4. If the decision of the Court of Appeal in *Sang* is now the law in England, then it can also be said that a strict rule of admissibility exists there.

The Fairness Approach

The English courts have consistently regarded the notion of fairness as the test of whether the discretionary rule should be exercised to exclude evidence which has been illegally or improperly obtained. At the same time, they have consistently refused to lay down any guidelines clarifying precisely how the fairness concept would apply in reaching a decision as to whether evidence unlawfully obtained should be excluded or included. This response is based upon the belief that an ill-defined notion of fairness has certain merits which make it worth maintaining. It avoids technicalities such as those which have grown around the rule of law that, in order to be admissible, a confession must be voluntary. It is vague enough to cater for the unforeseen case. As Lord Hodson said in *Selvey v. Director of Public Prosecutions*,

'Fair', as a word, may be imprecise, but I find it impossible to define it or even to attempt an enumeration of all the factors which have to be taken into account in any given case.⁴⁴

In *Selvey*, the argument was raised that fairness was too vague a concept to afford guidance to the courts. Lord Pearce rejected this argument by saying that 'one generation may take a different view of its application from another. But that is an advantage rather than otherwise.'⁴⁵ Similarly, Lord Fraser in the House of Lords decision in *Sang*, while discussing what was unfair, oppressive or morally reprehensible, said that 'these adjectives do undoubtedly describe standards which are largely subjective and which are therefore liable to variation. But I do not think there is any cause for anxiety in that. Judges of all courts are accustomed to deciding what is reasonable and to applying other standards containing a large subjective element.'⁴⁶

With respect, however, one is inclined to suspect that in practice, the English courts are uneasy 'that rules of evidence shall ever depend upon the discretion of the judges'⁴⁷ and wish that well-defined rules were expressed. This is borne out by the fact that despite the numerous judicial statements about 'fairness', it is perfectly obvious that a predominant number of English judges have paid these only lip service.

It is suggested that the loose notion of fairness governing the exercise of the discretion fails to provide sufficient guidance for that task. This inadequacy of the discretion results in the conviction or acquittal of an accused being made to depend on whether he appears before a judge who favours a narrow or wide formulation of the discretionary rule. Furthermore, the psychological comfort which is induced by a discretion based on

⁴⁴ [1968] 2 W.L.R. 1494, 1517. It was this second consideration which led the English Criminal Law Revision Committee to reject suggestions that the grounds upon which the discretion might be exercised should be specified in a statute. Eleventh Report of the Criminal Law Revision Committee, *supra* n. 39, para. 278.

⁴⁵ *Ibid.* 1531.

⁴⁶ *Supra* n. 7, 1241-2.

⁴⁷ *R. v. Eriswell (Inhabitants)* (1790) 3 Term Rep. 707, 711 *per* Grose J.

fairness may well be illusory and may be veiling a position which is causing injustice in practice.

While refusing to define what 'fairness' means, there is a judicial trend to define the scope of its operation. Fairness to the accused is said to be a concept which must not be allowed to get out of hand. What the criminal courts should be seeking to achieve is fairness 'in the general circumstances of the administration of justice.'⁴⁸ Although the term 'administration of justice' may well be afforded a wider coverage, the English courts have increasingly confined its use to trial proceedings. Thus the English Court of Appeal in *Sang* permitted a residual discretion to exclude evidence unfairly obtained, provided that it amounts to an abuse of the process of the court and is oppressive in that sense. This was held to stem from the discretion that every court had to decline to hear proceedings on the ground that they are oppressive and an abuse of the court.⁴⁹ The effect of such a holding is to relegate the notions of 'fairness' and 'justice' to the duty of a judge to ensure that an accused is given a 'fair trial' in the narrow sense that the trial proceedings must be fair.⁵⁰

One can therefore see how the English courts, by confining the notion of fairness to that of ensuring fair trial proceedings *per se*, have limited the discretionary rule expressed in *Kuruma* to one which goes to the determination of the value or weight of the evidence; the court is not concerned with the manner in which the evidence was obtained unless it affects the probative value of the evidence.

This same narrowing of the discretionary rule, caused by interpreting fairness solely in terms of trial procedure, can be observed in the Canadian cases. In the Canadian Supreme Court decision in *Wray*, Judson J., delivering the majority opinion, said:

The task of a Judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule. If this course is followed, an accused person has had a fair trial.⁵¹

Hence the English and Canadian courts have come to define the judicial discretion to refuse to accept certain classes of 'unfair' evidence in terms of what may be called the traditional formulation. This formulation relates

⁴⁸ See the Eleventh Report of the Criminal Law Revision Committee, *supra* n. 39, para. 27, citing *R. v. McGregor* [1968] 1 Q.B. 371.

⁴⁹ *Supra* n. 3, 63, and citing Lords Salmon and Edmund-Davies in *Director of Public Prosecutions v. Humphrys* [1976] 2 All E.R. 497, 527, 533; and Lord Devlin in *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, 1360.

⁵⁰ Following along this line of thought, Lord Diplock in *Sang* expressed the view that, apart from the rules pertaining to involuntary confessions, '... the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them.' *Supra* n. 7, 1230. See also Viscount Dilhorne, *ibid.* 1234. For a criticism of this confinement of the fairness notion to the trial itself, see Jackson J. D., 'Unfairness and the Judicial Discretion to Exclude Evidence' (1980) 130 *New Law Journal* 585, 586.

⁵¹ *Supra* n. 14, 695.

strictly to the observance of fair trial procedures. Its objective is to secure a fair and balanced presentation of the evidence before the jury.⁵² It is suggested here that Lord Goddard's statement in *Kuruma* was intended to mark the beginning of a modern formulation of the discretionary rule. That statement, it is recalled, was broadly phrased; a trial judge 'always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused.'⁵³ There is no suggestion here that fairness to an accused is to be considered only in the context of the actual trial procedures. In fact, Lord Goddard elaborated on his *dicta* by reference to the Scottish decision of *H.M. Advocate v. Turnbull* where illegally obtained evidence was held to be inadmissible. The reason for its inadmissibility, as stated by Lord Guthrie, was that:

If such important evidence upon a number of charges is tainted by the method by which it was deliberately secured, I am of opinion that a fair trial upon these charges is rendered impossible.⁵⁴

It is clear then that Lord Guthrie took the view that a trial cannot be fair unless the pre-trial procedure has also been fair. In the area of illegally and improperly obtained evidence, the modern formulation of the discretionary rule may therefore be said to have its basis in the judge's desire to 'secure scrupulously correct behaviour on the part of the police.'⁵⁵ This conclusion should be received with less hesitation when one remembers that it is on just such a basis that a judge may exercise a discretion to reject a voluntary confession which has been procured in breach of the Judges' Rules. It is submitted that the notion of fairness and its off-spring, the concept of a fair trial, should be approached on a broad basis that considers public policy considerations which go beyond the simple maintenance of fair trial procedure. As a prominent American judge has been led to say:

The courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. . . . Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.⁵⁶

The Factors Approach

The High Court of Australia in *Bunning v. Cross* contrasted the fairness approach with that of the Scottish and Irish courts by referring to the different aims sought to be achieved by each of these approaches.⁵⁷ The English courts have, as the aim of the discretionary process, the securing

⁵² On the House of Lords adherence to this traditional formulation, see *Sang*, *supra* n. 7, *per* Lord Diplock, 1230; *per* Viscount Dilhorne, 1234; *per* Lord Scarman, 1246. See a criticism of this formulation by Price D., 'Comment on *R. v. Sang*' (1980) 14 *The Law Teacher* 52, 53-4.

⁵³ *Supra* n. 1, 204.

⁵⁴ [1951] S.L.T. 409, 411-12.

⁵⁵ Gobbo J. A., Byrne D. and Heydon J. D. *Cross on Evidence* (Second Australian Edition, 1979) 29.

⁵⁶ *Sherman v. United States* (1958) 356 U.S. 369, 380 *per* Frankfurter J.

⁵⁷ *Supra* n. 27, *per* Stephen and Aickin JJ., 569.

of a fair trial for the accused. The problems created by the imprecise notion of fairness have already been set out. The Scottish, Irish, and more recently, Australian, approach has as its objective

no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.⁵⁸

Since these competing public policy considerations inevitably influence the exercise of the discretionary power, the latter approach, by its expressed recognition of these considerations, is naturally to be preferred. Indeed, three years before the judicial approval in *Bunning* of the Scottish and Irish position, the Australian Law Reform Commission had expressed a similar choice in the matter.⁵⁹

But if all that is contained in the Scottish-Australian approach is a statement expressing the need to balance conflicting public policy considerations, then it is one which is no clearer than the ill-defined notion of fairness that forms the theme of the fairness approach. The public policy considerations of crime control and public safety are by themselves too theoretical and general to be applied offhand to determine whether illegally obtained evidence should be excluded in a particular case. Recognizing this point, the Scottish and Australian courts have followed up by 'predigesting' these considerations into a number of factors or criteria for judges to deliberate upon. These factors serve as tangible guidelines for the courts thereby bridging the gap between the general expression of the discretionary power and a particular case.

The central characteristics of the factors approach are its flexibility and clarity. The factors that are considered are not rules as such. Some of them may be relied on and others not, depending upon the facts and circumstances of each case. For instance, the deliberateness of police conduct and the seriousness of the illegality may be factors which the court will analyse with a view to determining whether the admission of the evidence would increase police impropriety. But other factors, such as the status of the wrongdoer or the seriousness of the offence being investigated, may not be pertinent to this issue and may therefore be left out of consideration. It is this characteristic of flexibility which is the essential difference between this approach and the strict rule approach; the latter must be applied without qualification to every situation that comes within the ambit of the rule.

⁵⁸ *Ibid.*

⁵⁹ The Draft Bill of the Commission provides that evidence obtained in breach of, or in consequence of a breach of, any statutory or common law rule is inadmissible in criminal proceedings, unless the party seeking to have it admitted satisfies the court that admission would 'specifically and substantially benefit the public interest without unduly prejudicing the rights and freedoms of any person' *Australian Law Reform Commission, Report on 'Criminal Investigation' (Report No. 2) (1975), Draft Bill, s. 71; Report, paras. 288-98.*

The factors approach also allows for clarity. The outcome of the case will often depend on whether the illegally or improperly obtained evidence is admitted in court. With the consequence of conviction or acquittal at stake, the parties to the case and the general public would want to be told the reasons why the evidence was admitted or excluded. This is done when the court pronounces upon the factors which it regards as relevant to the case at hand. Moreover, such reasoned judgments will enable appellate courts to trace any omission or defect in the trial judge's exercise of the exclusionary discretion. This characteristic of clarity is to be contrasted with the fairness approach where judges are more or less left to their own devices in interpreting the notion of fairness. The result is that their rulings are often given without reasons being expressed and therefore prohibit satisfactory appellate review.

Factors to be considered in the exercise of the discretion

Scottish, Irish and Australian courts have drawn up quite a detailed range of factors relevant to the exercise of the discretionary rule. The Law Reform Commissions of Canada, Australia and New South Wales have confirmed and added to this list of factors.⁶⁰

(1) *The seriousness of the offence*

In deciding whether illegally or improperly obtained evidence is to be admitted, the court will consider the nature of the offence being investigated. If illegality can ever be excused, it will tend to be when a serious crime is being investigated.⁶¹ The implication here is that since it is of greater social importance to investigate the more serious offence, it follows that courts should more readily excuse irregularities by law enforcement officers in these cases.

While this factor has certainly been considered by the English courts, the notion of fairness has caused it to be inconsistently applied. As such the English Court of Appeal in *Sang* was recently led to say, '(t)he test cannot logically be different according to the gravity of the crime under investigation, with one test for murder or terrorism, and another for the perhaps less serious offence of drunken driving.'⁶² The factors approach avoids this confusion in the English law by referring to the seriousness of the crime investigated as one of many factors under consideration.

⁶⁰ *The Law Reform Commission of Canada*, supra n. 20; *the Australian Law Reform Commission*, supra n. 59; *the N.S.W. Law Reform Commission*, supra n. 35.

⁶¹ *People v. O'Brien*, supra n. 32, 160; *Bunning*, supra n. 27, 571; *R. v. Lavery* (1978) 19 S.A.S.R. 515, 519 per King J.; *Lavery (No. 2)* (1979) 20 S.A.S.R. 430, 471 per White J. (offence of robbery); *R. v. Warnemunde* [1978] Qd. R. 371, 376, per Stable S.P.J. (offence of drug trafficking); *French v. Scarman*, supra n. 29, per King C.J. 341. *The Law Reform Commission of Canada*, supra n. 20, Draft Evidence Code s. 15(2); *The Australian Law Reform Commission*, supra n. 59, Draft Bill, s. 71(2); *The N.S.W. Law Reform Commission*, supra n. 35, Draft Bill, s. 200(6) (b) (i).

⁶² *Supra* n. 3, per Roskill L.J., 60-1.

(2) *Circumstances of urgency*

Law enforcement officers might have resorted to improper methods of obtaining evidence because of circumstances of urgency. For example, a situation might arise where an item of real evidence would almost certainly be destroyed if it were not immediately seized.⁶³ There might be urgency in identifying a dangerous offender such as a homicidal maniac or a criminal about to flee the jurisdiction.⁶⁴ These are circumstances which would tend in favour of excusing the improper acts of the police.

(3) *Difficulty of detection*

This pertains to the necessity of the particular means used in the detection of the type of crime committed. The more secret the crime, the fewer traces it leaves and the more difficult the task of apprehension without resort to improper detection methods. This factor influenced the admission of illegal police recording of blackmailers in *Hopes v. H.M. Advocate*. The presiding judge, Lord Justice-General Clyde, said: 'If this kind of crime is to be stopped, methods such as the present one are necessary to detect and prove a particularly despicable type of crime which is practised in secret and away from observation.'⁶⁵

(4) *Whether the improper act has been remedied*

The court may have regard to the extent to which police impropriety has led to punishment of the officer responsible or has otherwise been remedied.⁶⁶ This consideration is derived from the fact that one of the main reasons for excluding the evidence — deterrence — has been satisfied. In the South Australian Supreme Court case of *French v. Scarman*,⁶⁷ police were held to have acted illegally when they refused to allow the accused the statutory right to have a blood test. A factor which influenced the court to exclude the evidence of breath analysis was the absence of any statutory sanction. The court intimated that, had there been one, it might not have resorted to excluding the evidence which was, in the circumstances, the only available sanction against the statutory breach by the police.⁶⁸

⁶³ *H.M. Advocate v. Hepper* [1958] J.C. 39; *H.M. Advocate v. M'Kay* [1961] J.C. 47; *Bell v. Hogg* [1967] S.L.T. 290; *Hay v. H.M. Advocate* [1968] S.L.T. 334; *Bunning*, *supra* n. 27, 570; *The Canadian Law Reform Commission*, *supra* n. 20, Draft Evidence Code, s. 15(2); *The Australian Law Reform Commission*, *supra* n. 59, Draft Bill s. 71(2); *The N.S.W. Law Reform Commission*, *supra* n. 35, s.200(6)(b)(iv).

⁶⁴ *The N.S.W. Law Reform Commission*, *supra* n. 35, s. 200(6)(b)(iii), see para. 3.12.

⁶⁵ [1960] J.C. 104, 110; see also *Marsh v. Johnston* [1959] S.L.T. 28 where police entrapment in liquor offences was held to be legitimate; *Warneminde* [1978] Qd.R. 371 where evidence of drug-trafficking obtained by police entrapment was admitted; *The N.S.W. Law Reform Commission*, *supra* n. 35, s. 200(6)(b)(iii). See para. 3.13.

⁶⁶ *The N.S.W. Law Reform Commission*, *supra* n. 35, s. 200(6)(b)(ix). See para. 3.18.

⁶⁷ *Supra* n. 29.

⁶⁸ *Ibid.* per King C.J., 340-1.

(5) *The reliability of the evidence*

The Australian High Court decision in *R. v. Lee* provides strong authority for the adoption of the reliability criterion as at least one of the factors to be considered in the exercise of the discretion. Although the court was concerned with oral admissions procured by improper means, its judgment can be applied to the whole area of illegally and improperly obtained evidence. The court unanimously approved the following formulation:

Surely, if the judge thought that the 'impropriety' was calculated to cause an untrue admission to be made, that would be a very strong reason for exercising his discretion against admitting the statement in question. If, on the other hand, he thought that it was not likely to result in an untrue admission being made, that would be a good reason, though not a conclusive reason, for allowing the evidence to be given.⁶⁹

However the same court in *Bunning* made the qualification that cogency of evidence should generally not be allowed to play any part in the exercise of the discretion where the illegality involved in obtaining it is intentional or reckless. The reason given was that to admit evidence so obtained 'may serve to foster the erroneous view that if such evidence be but damning enough, that will itself suffice to atone for the illegality involved in procuring it.'⁷⁰

(6) *Whether the improper act was accidental*

The illegality or impropriety might be the result of a mistaken belief on the part of law enforcement officers that they were entitled to do what they did.⁷¹ Such a circumstance would tend to excuse their misconduct, the reason being that 'there may be no purpose to flout the law but only a failure in good faith to stay within the complex rules relating to search and seizure. It is one thing to condemn the product of an arrogant defiance of the law; it is another to impose the sanction when the official tends to respect his oath of office but is found to be mistaken, let us say, by the margin of a single vote.'⁷²

There may also be cases where the police 'accidentally stumble upon evidence of a plainly incriminating character in the course of a search for a different purpose';⁷³ if this occurs, the evidence is admissible.⁷⁴

⁶⁹ 82 C.L.R. 133, 153. See also *The Canadian Law Reform Commission, supra* n. 20, Draft Evidence Code, s. 15(2); *The N.S.W. Law Reform Commission, supra* n. 35, Draft Bill, s. 200(6)(b)(x), see para. 3.19. *Lavery (No. 2)* 20 S.A.S.R. [1979] 430, 471; *R. v. Conley*, (1979) 21 S.A.S.R. 166, 169-70; *French v. Scarman, supra* n. 29, per King C.J. 341.

⁷⁰ *Supra* n. 27, 570. An exception to this qualification was granted in cases where important evidence of a perishable nature had to be secured without delay so as to avoid destruction.

⁷¹ *The Canadian Law Reform Commission, supra* n. 20, Draft Evidence Code, s. 15(2); *The N.S.W. Law Reform Commission, supra* n. 35, Draft Bill s. 200(6)(b)(v); *Bunning, supra* n. 27, 570; *Lavery (No. 2) supra* n. 69, 471; *Conley, supra* n. 69, 169.

⁷² *Eleuteri v. Richman* (1958) 141 A. 2d 46, 51 per Weintraub C.J.

⁷³ *H.M. Advocate v. Turnbull, supra* n. 54, per Lord Guthrie, 411.

⁷⁴ *H.M. Advocate v. Hepper* [1958] J.C. 39; see also *King* [1968] 2 All E.R. 610, 615 per Lord Hodson.

(7) *Whether the improper act was deliberate*

This is the converse of the preceding factor. The exclusionary discretion would be more readily exercised if there was a deliberate impropriety by the law enforcement officer.⁷⁵ This factor is founded on the disciplinary principle; there are far stronger grounds for disciplining an officer who intentionally flouted standards or procedures than an officer who transgresses unintentionally.

(8) *The ease of compliance*

If it would have been easy for the law enforcement officers to comply with stipulated legal procedures or other standards of behaviour and they did not, evidence obtained in breach of these might merit exclusion.⁷⁶ Hence, a deliberate 'cutting of corners' would tend against the admissibility of evidence illegally or improperly obtained. However, non-compliance with a rule which could be simple to follow might suggest that the rule was trivial and therefore that the non-compliance was not a fundamental breach. In such a case, the breach might be excused and the evidence admitted.⁷⁷

(9) *The status of the wrongdoer*

It may be more necessary to exclude evidence illegally or improperly procured by private inquiry agents and other persons who are not police officers. Police and other public officials are subject to various forms of control by their superiors, disciplinary boards, public opinion and their own codes and traditions whereas private investigators generally are not. Thus, evidence tendered by the latter should be subject to close judicial scrutiny.⁷⁸

(10) *The effect of improprieties on the accused*

Some procedures or behavioural standards governing law enforcement officers may be intended to safeguard recognized rights of suspected persons. If a breach of these procedures and standards has the effect of prejudicing those rights, the evidence would probably be excluded. This factor comes closest to the individual rights principle elaborated earlier. In *Cornelius v. R.* the Australian High Court explicitly rejected the disciplinary principle in favour of the individual rights principle when it said:

⁷⁵ *The Canadian Law Reform Commission*, supra n. 20, Draft Evidence Code, s. 15(2); *The N.S.W. Law Reform Commission*, supra n. 35, Draft Bill, s. 200(6)(b)(v); *Bunning*, supra n. 27, 570; *Conley*, supra n. 69, 169; *French v. Scarman*, supra n. 29, per King C.J. 340.

⁷⁶ *McDonald v. United States* (1948) 335 U.S. 451; *M'Govern v. H.M. Advocate* [1950] S.L.T. 133; *Bunning*, supra n. 27, 570-1; *The Australian Law Reform Commission*, supra n. 59, Draft Bill, s. 71(2); *The N.S.W. Law Reform Commission*, supra n. 35, Draft Bill, s. 200(6)(b)(vii). See para. 3.16.

⁷⁷ *Fairley v. Wardens of the City of London Fishmongers* (1951) S.L.T. 54.

⁷⁸ *The N.S.W. Law Reform Commission*, supra n. 35, Draft Bill, s. 200(5). See para. 3.6; *Lawrie v. Muir*, supra n. 25, 40; cf. *Senat* (1968) 52 Cr. App. Rep. 282; *Matthews* [1972] V.R. 3.

Approval or disapproval of the measures taken by the detectives to obtain a confession appears to us to be beside the point in deciding this question. What matters for present purposes is the effect produced upon the prisoner.⁷⁹

However, important as this factor is in determining whether the exclusionary discretion should be exercised, it has not been given proper attention by either the judiciary or the law reform bodies which have considered the discretion.⁸⁰

(11) *Whether the improper act is trivial or a fundamental breach*

Another factor sometimes mentioned is whether the impropriety was a serious or a trivial departure from the set procedures and standards.⁸¹ As with those factors concerned with whether breaches are accidental or deliberate, this factor is based upon the disciplinary principle. On this principle, a minor impropriety can be readily overlooked and the evidence admitted because it would be excessive to punish such trivial misconduct by the total exclusion of evidence. A related matter is where there is a deliberate policy of consistent breach of the law so that it must be discouraged by the exclusion of the evidence.⁸²

(12) *The intention of legislature*

Where evidence is obtained in a manner which is not in accordance with a prescribed statutory procedure and compliance with that procedure is a necessary step towards securing a conviction for a particular offence, then such evidence will not be admissible.⁸³ It has also been suggested that such a criterion for the exercise of the discretion could be based on an *implied*

⁷⁹ (1936) 55 C.L.R. 235, 251 *per* Dixon, Evatt and McTiernan JJ.

⁸⁰ Of the Canadian, Australian and the N.S.W. Law Commissions, only the first has alluded to this factor being considered in the exercise of the discretion. *The Canadian Law Reform Commission, supra* n. 20, Draft Evidence Code, s.15(2) states in part that '[i]n determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence . . .'. See also *Murphy* [1965] N.I. 138, where *Murphy J.*, 149, suggested one of the factors to be considered was 'the position of the accused'.

⁸¹ *The Australian Law Reform Commission, supra* n. 59, Draft Bill, s. 71(2), *The N.S.W. Law Reform Commission, supra* n. 35, Draft Bill, s. 200(6)(b)(v), *People v. O'Brien, supra* n. 32, *per* Kingsmill Moore J., 160; *Conley, supra* n. 69, 168.

⁸² *The N.S.W. Law Reform Commission, supra* n. 35, Draft Bill s. 200(6)(b)(vi), *H.M. Advocate v. Turnbull, supra* n. 54, *per* Lord Guthrie, 41; see also the New Zealand Court of Appeal decision in *Hall v. Police* [1976] Current Law 727 and discussed by Orchard G. F., 'A Rejection of Unfairly Obtained Evidence: a commentary on *Hall v. Police*' (1976) *New Zealand Law Journal* 434, 436-7.

⁸³ See *Scott v. Baker* (1968) 52 Cr. App. R. 566 (D.C.). The Road Safety Act 1967 (U.K.) s. 1, provides that it shall only be an offence if a person drives having consumed alcohol which is later shown to exceed the prescribed limit on the provision of a specimen under s. 3. See also *French v. Scarman, supra* n. 29; *Lawrie v. Muir, supra* n. 25, 40. In *Bunning, supra* n. 27, the joint judgment of Stephen and Aickin JJ. listed, as a fifth factor for consideration in the exercise of the discretion in that case, the intention of the Legislature appearing from the statute which was breached in the obtaining of the evidence. Upon this factor, it has been suggested that *Kuruma, supra* n. 1, and *King* [1969] 1 A.C. 304, are unsatisfactory decisions. See Heydon J. D., 'Illegally Obtained Evidence' [1973] *Criminal Law Review* 603, 607-9.

statutory prohibition. The argument is that where evidence has been obtained unlawfully,

. . . it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion: or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms.⁸⁴

The factors listed above are not exhaustive; they are factors which the courts and law reform commissions have considered relevant to the exercise of the exclusionary discretion. But other factors, yet unnoticed, may arise to assist in accommodating all the varied circumstances with which courts will be confronted in the future. This point was taken by the Canadian, Australian and New South Wales Law Reform Commissions, as their statutory proposals allow for other factors which they have not discussed.⁸⁵

Broadly speaking, of the twelve factors that have been discussed, the first six address themselves to the crime control consideration. The 'seriousness of the offence' factor may strictly be regarded as one which accords with both the crime control and public safety considerations depending on how the court construes the nature of the offence. Thus, evidence that will convict an accused for a minor crime may be excluded on the ground that it is better for him to be acquitted than to condone the damage to human dignity and social values caused by police impropriety. However, it is submitted, that the judicial practice is to consider this factor foremost with a view to admitting the evidence. If the offence is trivial, this factor is not considered, or, if it is, then only as an after-thought expressed in negative terms.⁸⁶ Other factors — circumstances of urgency, the difficulty of detection, whether the impropriety has been remedied, its accidental nature, and the reliability of the evidence — are all clearly intended to favour the admission of evidence in order that the general justifying aim of crime control and prevention may be achieved.

On the other hand, factors like the deliberateness of the improper act, its effect on the accused, the ease of compliance, and the status of the wrongdoer, are geared to satisfying the public safety consideration and its two underlying concepts — the disciplinary principle and the individual rights principle. The last two factors — the seriousness of the improper act and the intention of legislature — may accommodate either of the two competing public policy considerations, depending on how the court interprets the nature of the impropriety or the statutory provision.

It can thus be seen how the factors approach enables the courts to give due regard to the balancing of the contrasting public policy considerations.

⁸⁴ *Ireland*, *supra* n. 28, *per* Barwick C.J., 735. See also the *N.S.W. Law Reform Commission*, *supra* n. 35, para. 3.21.

⁸⁵ When listing the factors, the *Canadian Law Reform Commission*, *supra* n. 20, Draft Evidence Code, s. 15(2), uses the phrase 'all the circumstances surrounding the proceedings . . . including . . .'. Similarly, the *Australian Law Reform Commission*, *supra* n. 59, Draft Bill, also uses the phrase 'all relevant matters including . . .'. See para. 3.20.

⁸⁶ See for example, *Bunning*, *supra* n. 27, 571.

Since the High Court decision in *Bunning*, the Australian courts have adopted this approach in the determination of whether illegally and improperly obtained evidence is to be excluded. However, its use in this jurisdiction is still in its infancy. Thus far, the factors approach has been applied in only four cases, including *Bunning*. The three other cases were all decisions of the Supreme Court of South Australia.⁸⁷ Could it be that the courts and the lawyers of the other five Australian States and the Territories have not awakened to the importance of the ruling in *Bunning*? Even with the four cases mentioned, there may be some validity in the view that crime control is still regarded as the paramount public policy consideration. Only in one of these decisions was the wrongfully obtained evidence excluded.⁸⁸ This observation is made without any intention to promote a strict exclusionary rule. Nevertheless one cannot ignore the observation that in the cases which admitted the evidence, special regard was placed on the seriousness of the offence, the accidental nature of the impropriety, and the reliability of the evidence. It may well be that the Australian courts are still in the process of being weaned away from the English approach with its over-emphasis on the control of crime.

CONCLUSION: LEGISLATING FOR THE EXERCISE OF THE DISCRETION

The response of the courts towards the existence and formulation of the discretion has been almost as varied as the jurisdictions they represent. Those courts which have not only recognized but developed guidelines for the exercise of the discretion are to be commended. However, for these courts, there is the continuing danger that the discretionary power may become one which judicial pride always asserts but judicial conservatism never applies. The reasons for such conservatism arise from the very nature and underlying basis of the discretion itself.

First there is the formidable task of drawing guidelines for the use of the discretion. Although much has already been achieved, the courts are still creating standardized procedures for the delicate processes of investigation and detection. Until such procedures are established, the courts might well hesitate to exercise the discretion so as to exclude impugned evidence. Secondly, there are high public policy interests involved. The courts are required to assess the relative importance of an individual right, to evaluate the social benefits which may result from its curtailment, and then to decide whether the expected increase in crime control is worth the sacrifice of the right. Then there are political judgments about how best to control improper police methods. It is submitted that the courts are not the proper forum for reaching a balance of conflicting public policy considerations.

⁸⁷ *French v. Scarman*, *supra* n. 29; *Lavery (No. 2)*, *supra* n. 69; *Conley*, *supra* n. 69.

⁸⁸ *French v. Scarman*, *ibid.*

Judicial inability to meet this task will probably result in conservative use of the discretion. Thirdly, guidelines for the exercise of the discretion are being judicially formulated without adequate empirical data on the nature of police practices, the need for such practices or the effect of judicial decisions upon them. The courts are not equipped with facilities for such essential empirical study. The lack of such knowledge by the courts will conceivably result in their 'erring on the safe side' by being conservative in the exercise of the discretion.

All these considerations point to the one body which is best suited to the task, the Parliament. Parliament, being theoretically representative of the people and the 'mouthpiece of the nation',⁸⁹ is the ideal forum where public policy interests can be debated, weighed and balanced. Parliamentary select committees and research bodies can readily be established to collect and analyse empirical material which might assist the Parliament in its deliberations. Legislative pronouncements upon the discretion will have the advantage of encouraging clarity and consistency in practice. It would also provide the legislative stamp of approval which courts appear to be seeking.⁹⁰ Furthermore, it would meet the urgent need to standardize procedural rules which cannot be filled by the relatively slow evolution of the common law.⁹¹

Despite increased police malpractice, both proven and alleged, there has been currently little effort by Parliament to develop appropriate legal responses to meet the violation of individual rights which might arise in the context of such malpractices. Legislative inaction is probably due to a variety of political factors, including pressure from advocates of 'law and order' and the police themselves. Moreover, Parliament has actually increased the effectiveness of such law enforcement by enacting statutes which allow for controlled electronic surveillance.⁹² Fortunately, as has been observed, the Law Reform Commissions in many jurisdictions have been awake to the pressing need to legislate in the area of illegally and improperly obtained evidence. It is hoped that the recommendations of these Commissions will not be neglected but, rather heartily adopted by Parliament.

⁸⁹ Lord Wright, 'Liberty and the Common Law' (1945) 9 *Cambridge Law Journal* 2, 12.

⁹⁰ This is most clearly seen in the intention of legislatures being regarded as an important factor determining whether the improperly obtained evidence ought to be excluded or not.

⁹¹ For the suggestion that the courts urgently require legislative guidelines and rules governing police spying, see Amsterdam A. G., 'Perspectives on the Fourth Amendment' (1974) 58 *Minnesota Law Review* 349, 406-9, 416-17.

⁹² For example, the Listening Devices Act 1969 (N.S.W.); the Telephonic Communications (Interception) Act 1960-1966 (Cth); the Protection of Privacy Act 1974, c. 50 (Canada). See Burns P., 'Electronic Eavesdropping and the Federal Response: Cloning a Hybrid' (1975) 10 *University of British Columbia Law Review* 36.